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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1169.

ALFRED S. CALABRESE and JOHN M. DELZOPPO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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TABLE OF CONTENTS.

Reply to Government's Statement of Facts 1

Reply to Government's Argument No. 1 4

Reply to Government's Argument No. 2 7

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REPLY TO GOVERNMENT'S STATEMENT OF FACTS.

In reviewing the statement of facts as contained in the brief of the United States, Petitioners feel compelled to briefly reply thereto for the purpose of clarification. It is understood by counsel for the Petitioners that the attorneys for the Department of Justice who prepared the statement of facts did not actually partake in the trial of this matter in the trial court and, therefore, certain occurrences as set forth in the Government's statement of facts may have been misinterpreted. It is the hope of the Petitioners that by this reply to said statement of facts, the same may be clarified.

The Government's statement of facts points out that shortly after the arrest of the Petitioners, F.B.I. agents searched along Belvoir Blvd., in the area of the arrest, and found two stockings, one of which had been knotted, and

a pair of black gloves. (Government's Brief, page 3.) Further testimony at the trial disclosed, however, that the same stockings were presented to the F.B.I. Laboratory for analysis; that human *head hairs* were discovered in said stockings; that said hairs were compared to human head hairs of the Petitioners, as supplied by the Cleveland Federal Bureau of Investigation to the Washington Bureau, and that by reason of the resulting comparison the F.B.I. expert was of the opinion that none of the hairs supplied as having come from the Petitioners matched the human head hairs taken from the stockings found on Belvoir Blvd.

"Mr. Barragate: All right. In any event, did you make a scientific examination and comparison of the human head hairs that you found in Government's Exhibit 47 with the hairs marked as defendant Calabrese's sampling of hair?

Agent Jennett: Yes, sir, I did.

Mr. Barragate: And what was the net result of that examination?

Agent Jennett: That the five human head hairs found in Government's Exhibit—

Mr. Barragate: 47?

Agent Jennett: 47—did not originate from the hairs furnished to me as having come from a Mr. Calabrese.

Mr. Barragate: When you say that they did not originate, you mean that they didn't come from this head of hair (indicating)?

Agent Jennett: That is correct." (Tr. 435.)

* * * * *

"Mr. Barragate: And again with respect to those comparisons, you found, did you not, that they did not come from the purported source that they were marked, with respect to the hairs that you found in Government's Exhibit 47? In other words, they were

not Calabrese's head hairs as compared to the ones you had?

The Court: Obviously, from what he has already testified the affirmative must be the answer to that question that the samples that he had were not the same as the hair which were marked as Calabrese's hair.

Mr. Barragate: Precisely, your Honor, precisely.

The Court: Is that correct?

Agent Jennett: Yes.

Mr. Barragate: And that is likewise true with respect to the defendant Delzoppo?

Agent Jennett: I didn't have a known sample as having come from—

Mr. Barragate: But you had a sample which was marked as having come from Delzoppo's head?

Agent Jennett: Yes." (Tr. 441-442.)

Note: [The Exhibit referred to—Exhibit 47—was a nylon stocking found on Belvoir Blvd.]

Further, in the statement of facts contained in the Government's brief, mention is made that a search of the Delzoppo automobile uncovered "several items of clothing, including a pair of gloves, and four pairs of sunglasses." (Government's Brief, pages 3 and 4.)

It must be pointed out that in all fairness none of these items were ever introduced by the Government in evidence; none of these items were ever presented to the bank witnesses for identification; and at no time did the Government contend that these items were used in the perpetration of the bank robbery or had any connection therewith. It is the hope of Petitioners' counsel, therefore, that this Court will be clarified as to the facts regarding the items of clothing found in Delzoppo's automobile and will not be misled to believe that the Government *at any time* contended that these items were used in the perpetration of the bank robbery.

It is the further hope of Petitioners' counsel that this clarification of the statement of facts as set forth in the Government's brief will aid the Court in a fair determination of the merits of the Petitioners' claim. Petitioners will now attempt to briefly reply to the points raised in the brief of the Government.

REPLY TO GOVERNMENT'S ARGUMENT NO. 1.

The Government contends that the trial court's questioning "of a few of the witnesses was intended to clarify confusing matters." (Government's Brief, page 5.) It is not contended by the Petitioners that a trial court does not have power to question witnesses in order to clarify. It is contended, however, that when questioning is undertaken by the trial court, the same must be conducted with discretion so as not to convey an opinion or a "hidden meaning" to the jury as to either the questioning or guilt or innocence of the defendants. Only by a reading of the testimony containing the questioning of the court, can a reviewing court determine whether the court acted within its discretion to question, or whether the court conveyed a hidden meaning or opinion as to the guilt or innocence of the Petitioners to the jury. In that regard, this Court is respectfully directed to the testimony of defense witness, Rollie J. Oker, and particularly the redirect examination thereof and the questions by the Court. (Tr. 557-559.) It was following this examination by the Court that culminated in the objection of defense counsel to the examination of various witnesses by the Court and the dissertation that followed thereon. (Tr. 561-565.) It was also at this point in the trial that defense counsel in objecting to the questioning of the Court indicated to the Court that its objection was not only as to questions asked but as to the manner and inflection given by the Court in asking the particular question.

"Mr. Barragate: The basis of the objection, your Honor, is that the jury may get some impression, from the manner in which the questions are asked by the Court, that the Court is becoming partial to either one side or the other side; and that, therefore, the questioning of any witness by the Court becomes prejudicial to the defendants in this case, because if the jury were to infer from the questions asked by the Court that the Court was being partial to the Government in its case, then obviously their judgment would be influenced by that determination. This is the only basis and reason of the objection.

Mr. Oaker: May I—

The Court: I think you ought to describe the manner in which the Court did—

Mr. Barragate: You can't describe it and the Record can't show it, because the Record reflects only the bare words, and that is the unfortunate part of the situation." (Tr. 562-563.)

The Government further contends in its brief that in one instance the examination of the Court resulted in an order favorable to the Petitioners, to the effect that the opinion of a Government expert witness was to be disregarded. (Government's Brief, page 5.) The particular opinion in question dealt with the inability of the expert witness of the Government to state an opinion based upon reasonable scientific certainty that a button found in what was admittedly the escape vehicle came from the shirt which had been introduced in evidence by the Government and had been claimed to have been thrown from the vehicle occupied by the Petitioners. A review of the testimony cited by the Government in its brief (specifically Tr. 466-484) clearly demonstrates that the Court ordered the opinion of the expert stricken only after it was faced with no other alternative. The Court conducted an examination of the witness which in the opinion of this counsel was

intended to elicit from the expert witness an opinion that based on reasonable scientific certainty the button in question came from the shirt in question. Whether or not the reviewing Court would be of the same opinion can only be determined by this Court reviewing the cited portions of the Transcript of Agent Nelson J. Jennett. It is unfortunate, however, that the Transcript cannot indicate the inflection given by the Court to certain words, which, of course, can totally change their meaning. One particular example which is clear in the mind of this counsel is the inflection given by the Court to the word "substantial" in regard to its use and a question propounded to the expert:

> "The Court: Now there is obviously a difference between 35/64 and 34.4/64, is that correct?
> The Witness: Yes, sir, that's correct.
> The Court: And that difference is .6/64 correct?
> The Witness: Yes, sir.
> The Court: Now would you call that a substantial difference?" (Tr. 474-475.)

The Government further contends in their brief that the Court's instruction to the jury during the course of the trial dealt largely with the meaning of the testimony and was not erroneous in substance. The Government further states that "although such comments might have reduced the strategic value of that testimony, they were not erroneous in substance." (Government's Brief, page 5.) Again, in reply, Petitioners' counsel submits to the Court that only a reading of the particular testimony in question will suffice for this Court to determine whether or not the purpose of the Court was to clarify for the jury or whether or not the effect thereof was to indicate to the jury an opinion or partiality.

Lastly, in regard to the first argument contained in the Government's brief, the Government contends that

at no time did the Court express an opinion as to the guilt or innocence of the Petitioners but to the contrary admonished the jury that there were no "hidden meanings in any of the Court's language." (Government's Brief, page 5.) It is respectfully submitted that a question arises as to why the Court felt compelled to instruct the jury that there were no hidden meanings in the Court's language unless the probability of the same had arisen from the conduct of the Court throughout the course of the trial.

REPLY TO GOVERNMENT'S ARGUMENT NO. 2.

Contained in the Government's answer brief (page 6) is the following statement:

> "Prior to Petitioners first trial the Court ordered the Government over its objection to produce these memoranda which had never been read, acknowledged or signed by the employees. The Court felt that the memoranda did not qualify as statements producible under the Jencks Act, 18 U.S.C. 3500, but felt that the defense was entitled to use the statements to assist in preparing for trial."

It is respectfully submitted that this is a clearly erroneous statement. This counsel is convinced, however, that the statement is not made with the intent to deceive this Court, but merely made because of the fact that the Assistant Attorney General was not aware of the facts as they took place during the course of the first trial. The fact of the matter was that the trial court, Judge Thomas Lambros presiding, during the course of the first trial clearly ruled that the statements in question came under the purview of the Jencks Act notwithstanding the fact that the Government submitted a memoranda to the contrary. Thereafter, the Court not only allowed the defense to use such statements to assist in preparing for trial, but

most important (and pursuant to the provisions of the Jencks Act) allowed the defense to make full use of the statements in cross-examination. That the statements were ruled as Jencks Act statements during the course of the first trial has already been clearly established and accepted and, although the Government may have contended at one point that these statements were not Jencks Act statements, the Government at no time contended that they were not ruled as being such by the first trial court.

One point that particularly astonishes Petitioners' counsel, is the continued reference in the Government's brief presently under consideration and in prior briefs of the Government regarding the matter as to defense counsel's "reading" from the statements in cross-examination. What this "reading" consisted of was defense counsel's propounding a question to the witness in the following fashion:

> "Mr. Barragate: [directed to the witness Betty Jamison]. Now, coming back with respect to the man who jumped over the counter, you recall, in talking with special agent Startzell, telling him that that man was about 5' 10" to 5' 11" tall." (Tr. 135.)

This was exactly the manner in which counsel would propound questions upon cross-examination to the various eye witnesses. In doing so, counsel for Petitioners would go through the statement of the officer of the Federal Bureau of Investigation, who prepared said statement from his recollection of his conversation with the particular witness, and counsel would ask the particular witness whether or not a certain statement was made by the witness to an F.B.I. agent. What other fashion the cross-examination of the eye witnesses based upon their prior inconsistent statements could take is unknown to this counsel. The fact that counsel held the particular statement in his hand

and questioned from it while the witness was on the witness stand was counsel's only method of referring to what the agent recalled as being the prior statement of the witness. Counsel could certainly not be called upon to commit the entire statement into memory and then question from what his memory was of the statement. Certainly there was no unfairness from holding the statement in counsel's hand during cross-examination and from questioning as to whether the witness made a prior inconsistent statement as was indicated thereon. The continued harassment of counsel during the entire course of the cross-examination of the eye witnesses, as based upon these statements, the breaking up of said cross-examination by the Court's complete misunderstanding of said statements and the Jencks Act and the inability of Petitioners' counsel to effectively cross-examine and impeach thereon is the very basis of the request for review by this Court.

It is stated in the Government's brief:

> "At the second trial the Judge initially ruled that counsel could not 'cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act.'" (Tr. 210, Government's Brief, page 6.)

Thereafter, in their brief regarding this assertion the Government contends, however, that the defense was not limited or hampered in their cross-examination. Petitioners' counsel respectfully submits to this Court that the trial court's action throughout the cross-examination of the eye witnesses was consistent with the trial court's opinion that Petitioners' counsel could not "cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act." Petitioners' counsel further respectfully submits that the trial court, having

that opinion, harassed, limited and hampered a cross-examination of these vital witnesses as to prior inconsistent statements; that, the Court's later realization and admission of the Court's error and the Court's granting to defense counsel the right to recall the various witnesses for further cross-examination is clear proof that the trial court itself felt that the cross-examination had been hampered by the erroneous ruling and belief of the Court. The only real question remaining, it would seem, is whether Petitioners' counsel can be faulted for not availing himself of the opportunity given by the Court to recall the witnesses. It is respectfully submitted that the reason for the decision for Petitioners' counsel not to recall the witnesses has already been adequately demonstrated. Suffice it to say that the Petitioners will rely upon this Court's experience regarding the recalling of witnesses long after their direct and cross-examination had been completed. It is respectfully submitted to the Court that had the need for recalling witnesses been caused through an error or omission on the part of the Petitioners, then it would appear that they should run the risk of the effect of recalling the witnesses; however, the Petitioners having been blameless in this regard and the fault resting upon the Court and the Assistant District Attorney, essential fairness would seem to require that Petitioners not be burdened with risk of recalling witnesses for testimony that should properly have been admitted without limitation or harassment, in the first instance.

Lastly, in the Government's answer brief, it is contended that while the Court determined that Petitioners had suffered no prejudice from the prior restriction on the use of the memoranda and cross-examination the Court nevertheless agreed to allow defense counsel to recall any of the bank employees for further cross-examination. It

is Petitioners' contention that the Court very well felt that the prejudicial error may have resulted from its prior actions but took the position that it would nonetheless go forward since a reviewing court would always have the opportunity to make that determination with regard to prejudicial error.

> "The Court: Well, I have made a few statements on the Record. With the exception of the Jencks Act statements—'Jencks Act statements'—I think everything else I said was fully justified, whether in or out of the presence of the jury.
>
> I am concerned about the effect of whatever the Court might have said in the presence of the jury with regard to the statements, however." (Tr. 335.)
>
> * * * * * *
>
> "The Court: I will instruct them, and if you wish to go forward with additional cross-examination with regard to them, fine and if you don't, we will go forward with the trial. The worst that can happen is that we face another trial later." (Tr. 326-327.)

In regard to this point, Petitioners' counsel further respectfully directs this Court's attention to the opinion of the Court of Appeals in affirming the Petitioners' conviction, in particular page 6 thereof, wherein the Court of Appeals states:

> "The Record further discloses that, even before the District Court ruled that the statements were within the scope of the Jencks Act, cross-examination and impeachment were not prevented. The District Court merely disapproved of the method that was being employed by defense counsel."

One may well question why the District Court later allowed the defendants the right to recall the bank eye witnesses for further cross-examination if, in fact, their cross-examination and impeachment was not prevented in

the first instance and if, in fact, the District Court merely *rightfully* disapproved of the method being employed by defense counsel in the original cross-examination and impeachment.

Again, Petitioners' counsel respectfully directs this Court to the opinion of the Court of Appeals (page 8) wherein it is likewise stated as follows:

> "Although the District Court initially limited to some extent the use of the statements on cross-examination, we hold on a review of the entire record that the limitation was not so severe as to constitute an abuse of discretion."

The Court of Appeals' opinion thereafter goes on to state that the manner of asking questions is "within the trial court's sound discretion," yet, one can again question if that discretion was properly exercised then why did the District Court allow recall for further examination. It must lastly be pointed out that although the Court of Appeals was of the opinion that cross-examination was limited rather than prevented, it is respectfully submitted by Petitioners that in a criminal matter of such grave consequences a limitation in any form of cross-examination and impeachment of *vital eye witnesses* should, in itself, be cause for reversal and fine hairs cannot be split as to the severity of the limitation.

Petitioners' counsel is of the hope that this Court will review with particular attention the portions of the transcript regarding the controversy as to the Jencks Act statement and the colloquy between the Court and counsel. (Tr. 307-355.)

In conclusion, the Petitioners respectfully submit to this Court that much of the thrust of our legal system in the last decade has been to insure essential fairness to a defendant in a criminal matter while preserving the rights

of the Government; that, it is difficult to be proud of a trial or to uphold a claim of essential fairness wherein a defendant *through no fault of his own* becomes the victim of an error which seriously affects his ability to defend himself and then has placed upon him the burden of attempting to remove that error; and that, in the matter now before the Court, the Petitioners ask not that they be found innocent of the crime charges but that they be given an opportunity to present their defense fully and completely and that they be unhampered and unrestrained in their rightful attempts to impeach witnesses who give testimony against them. It is only then that the Petitioners, regardless of the eventual outcome, will truly feel that essential fairness has been had and only then that justice will truly be served.

Respectfully submitted,

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